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IN THE

Supreme Court of the United States

October Term, 1970

No. 71-61

SEYED MOHAMMED SADRZADEH,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE NINTH CIRCUIT COURT OF APPEALS.

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SEYED MOHAMMED SADRZADEH,

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vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE NINTH CIRCUIT COURT OF APPEALS.

Petitioner prays that a writ of certiorari issue to review a judgment of the Ninth Circuit Court of Appeals entered in the above entitled case on April 9, 1971.

Citations to Opinions Below.

The judgment of the Court of Appeals is reported at 439 F. 2d 389. Said opinion is printed and attached hereto and made a part hereof as Appendix A.

Jurisdiction.

The Ninth Circuit Court of Appeals affirmed the conviction of petitioner on April 9, 1971. The jurisdiction of this court is invoked under 28 U.S.C., Section 1254.

All questions raised in this instant petition were raised in the court below and on appeal to the Ninth Circuit Court of Appeals.

Questions Presented.

I. Whether petitioner's request to withdraw his waiver of jury trial should have been granted by the trial court and whether petitioner was denied his constitutional right to trial by jury.

II. Whether petitioner was denied his Constitutional rights to due process and a fair trial by the trial court determining that it did not have discretion to order an independent lie detector test or to permit petitioner to introduce into evidence the results of a lie detector test taken by him in view of the circumstances and facts of the case.

III. Whether petitioner was denied his Constitutional rights to due process and a fair trial by the trial court's failure to exercise its discretion on the question of admissibility of the results of a lie detector test taken by petitioner.

IV. Whether the results of a lie detector test taken by a defendant may be received into evidence provided that a proper foundation is laid for the introduction of such test results.

V. Whether petitioner's Constitutional rights under the First and Fourth Amendments were infringed by the obstruction and delay of the flow of United States mail not incident to either the investigation or arrest of petitioner and whether petitioner's motions below to dismiss and to suppress evidence should have been granted.

VI. Whether the court below should have granted petitioner's motion to suppress all items of evidence excepting a suitcase and its contents.

VII. Whether petitioner's Constitutional rights to due process and a fair trial were violated by the pros-

ecutor placing certain prejudicial evidence before the trier of fact.

VIII. Whether the government established that the subsfance involved in the case was contraband.

IX. Whether the violation of postal and customs regulations virtually created the crime and the criminal, and whether the government should thereby be estopped from prosecution.

Constitutional Provisions.

1. The Constitutional provisions involved are the First, Fourth, and Sixth Amendments to the United States Constitution. They are printed in 1 U.S.C. XLVI.

Statement of the Case.

Petitioner was originally charged with his wife, Toni, in a two-count indictment alleging a violation of 21 USC section 176a—concealment of refined marijuana in Count I, and illegal importation of refined marijuana in Count II [CT 1-2].[1] Prior to trial, both defendants made motions to dismiss the indictment and to suppress evidence [CT 6]. After the introduction of evidence and arguments on these motions, they were denied as to both defendants and as to all articles seized [RT 132].[2]

Subsequent to the denial of the motions, jury was waived by each defendant and the waiver accepted by the court [CT 29]. It was thereafter stipulated that the court could hear the case by consideration of the evidence introduced at the motions, and by stipulation as to testimony of various government witnesses, with

[1]Reference "CT" is to the Clerk's Transcript.
[2]Reference "RT" is to the Reporter's Transcript.

defendants permitted to call witnesses in defense of the action [RT 122].

During the course of the trial the court permitted a new Information to be filed and thereupon accepted a change of plea by defendant Toni Sadrzadeh to one count of violation of Title 26, section 4741(a), the tax count provision [RT 230-237]. The court found Mohammed Sadrzadeh guilty as charged in Counts I and II of the Indictment [RT 248], and after a motion for judgment of acquittal or, in the alternative, for a new trial was duly denied, petitioner was sentenced to serve five years on each count, said sentences to run concurrently [CT 58]. After the plea of guilty, the co-defendant, Toni Sadrzadeh, was placed on probation.

Statement of Facts.

The United States Customs Service received for processing on November 20, 1969, a package addressed to Toni Sadrzadeh from Afghanistan [RT 20]. At this time, it was the practice of U.S. Customs employees, by directives, to open all packages from the Near East; and therefore, this package—a suitcase with sealed wire attachment—was broken into before delivery [RT 24]. The employee, after opening the suitcase, removed two jackets, discovered a false bottom, and upon removal found certain plastic bags [RT 24]. This was reported to the supervisor, and within a few minutes a special agent for the Customs Service took charge of the investigation [RT 49]. Special agent O'Brian took a portion of the material in the

plastic bags to be analyzed by a chemist on November 21, 1969 [RT 73]. Thereafter, on November 25th, the false bottom was repaired and the packages sprayed with florescent powder [RT 62-63]. In the interim, the agent made one trip to the Sadrzadeh apartment, and then on November 29th, the package was prepared for delivery through the Santa Monica Post Office [RT 65]. The agent, along with others, took up surveillance at the apartment located at 139 Ocean Avenue [RT 67] and thereafter observed Mohammed Sadrzadeh take delivery of the parcel, sign for it, and walk downstairs into the apartment. The delivery of the suitcase by the postal employee was at 10:50 a.m., and the search warrant was executed at 11:00 a.m. and served on Mohammed Sadrzadeh at 11:55 a.m., with the search thereafter being conducted at 12:05 p.m. [RT 126].

Prior to the search, Mohammed and Toni Sadrzadeh were apprehended on the sidewalk outside their apartment by eight agents who indicated that they were under arrest [RT 170] and then escorted them back down to their apartment, with the search warrant being served on the doorstep [RT 68, 84]. The search was made pursuant to the search warrant, addressed to 139 Ocean Avenue, Apartment B, Santa Monica, California, and the search was conducted of the apartment, together with the storage area for that apartment [RT 138]. During the course of the search, the false bottom suitcase was found on the kitchen floor with the false bottom opened [RT 138]. Moreover, various

articles were found in the apartment with debris of what appeared to be hashish or marijuana, and then during the course of the search, a florescent light was shined on the hands of petitioner and florescent powder was observed [RT 139]. The ultraviolet light disclosed further that the door to the storage area had florescent powder on it, as did a box found in the storage area by an agent of the Customs Service [RT 139]. Inside the box, discovered by this agent, was a brown paper bag and inside of this brown paper bag were six plastic bags containing what appeared to be hashish. The paper bag and the plastic bags all contained florescent powder. Various other items and paraphernalia [listed on the inventory] were confiscated and taken as evidence [RT 140]. The box containing the brown paper bag with the plastic bags inside was located behind a trunk in the storage area [RT 142]. Inside the trunk in the storage area was also a brass can containing hashish and a tin containing marijuana, as well as three pipes [RT 142].

The chemist was an employee of the U.S. Customs Service and was stipulated to be, by virtue of education and experience, qualified to test for narcotic substance. The analysis indicated that various articles and debris contained either hashish or marijuana [RT 143-144]. Further, the contents of the plastic bags contained hashish, and each of the said bags weighed approximately one pound [RT 145].

Defendant Toni Sadrzadeh testified that her husband, Mohammed, an Iranian student, was pursuing

graduate studies at UCLA and had made a trip to Iran approximately one year prior thereto. This trip was for the dual purpose of visiting his family after a long absence after graduation and to make arrangements for the purchase of garments to be shipped to Los Angeles so that defendants could open a retail store in a shopping center [RT 153-156]. They had received at least twenty packages and had twice previously received hashish, of somewhere under a pound, in the packages [RT 163]. Both Toni and Mohammed Sadrzadeh were mild users of the substance [RT 164]. As for the suitcase, Toni Sadrzadeh testified that it was obvious there was something in it, because it was very heavy when the coats were removed and you could smell the hashish [RT 168-169]. She further testified that her husband, Mohammed, received the suitcase, opened it up, took the paper bag and segregated it into six small sacks, and then put it in the back of the trunk or in some box in the storage area [RT 194].

Toni Sardrzadeh further testified that after being apprehended, she and her husband were afraid to tell the officers where the hashish was located, because they were frightened, but neither she nor her husband had ever sold the contraband, nor did they know this suitcase contained the hashish before its receipt [RT 174].

REASONS FOR GRANTING THE WRIT.

I.

The Court Should Grant Certiorari to Decide Whether Petitioner's Request to Withdraw His Waiver of Jury Trial Should Have Been Granted by the Trial Court and Whether Petitioner Was Denied His Constitutional Right to Trial by Jury in That:

A. Petitioner was prejudiced by the withdrawal of a previously entered plea of not guilty by his co-defendant wife and the subsequent entry of a plea of guilty by his co-defendant during the course of the trial after testimony by the co-defendant involving petitioner;

B. Petitioner did not have opportunity for a full confrontation and cross-examination of the co-defendant.

This case was prepared and tried with a view that absolute candor by the defendants, who were husband and wife, would prove their innocence. Hence, the dual request for a lie detector test and the assuming of the witness stand by defendant Toni Sadrzadeh, with the frank admissions and discussion of receipt of two prior packages with hashish in them and the comments of use by both parties. The testimony of this defendant further amplified the conduct of each upon receipt of the suitcase with the contraband involved in this matter. These factors were evident from the outset, to wit: (1) the facts were essentially the same as to each defendant; (2) the defense was a joint defense; and (3) the testimony of Toni was not only presented to assist her, but to assist her husband in his defense. Finally, it was obvious that the motivation of the joint defense was so that the court could conclude

that neither knew of the impending arrival of the hashish in the suitcase and that the concealment of the contraband for an hour before the arrest was not a criminal concealment but was the act of two frightened people who could not have formulated a criminal intent in so short a period.

This approach of candor was totally eliminated from factual consideration by the change of plea to a newly filed Information by Tony Sadrzadeh, who had just finished testifying.

In this respect, directly after the lengthy testimony of Toni Sadrzadeh, she elected to change her plea to guilty to a newly filed Information. This was handled by the United States Attorney bringing the matter of change of plea directly to the court's attention [RT 230]. Following this ensued a lengthy colloquy between the defendant, her defense counsel, the United States Attorney and the court relating to a waiver of indictment and proceeding by information, waiver of jury, reading of the information, plea of guilty, admission of the acts contained in this information, a determination of the voluntariness of the plea, an indication by the defendant that full discussion had been had with her attorney prior to plea, ratification by her attorney, and finally acceptance by the court of the plea [RT 230-237].

This turn of events may have been well and good concerning the subsequent granting of probation to this defendant (Toni Sadrzadeh) who was obviously concerned, and rightly so, with the sentence involved in a finding of guilty to the original indictment. As for defendant Mohammed Sadrzadeh, however, the entire base for the defense, and the total reasoning be-

hind the jury trial waiver, had all of a sudden vanished. Logically, at this point, the trier of fact could never find petitioner innocent, for the juxtaposition would be too much to ask of any person. For this reason, without hesitation petitioner requested a withdrawal of the waiver of jury trial [RT 238]. Moreover, at this particular time, the trial itself had only been in session for one day and the case was still in progress, not having been concluded against this defendant.

In view of the foregoing, it is petitioner's position that the United States Attorney committed prejudicial error in presenting the change of plea in this type of case, under these circumstances, to the trier of fact, and that for reasons hereafter detailed, petitioner should have been permitted to withdraw the waiver of jury trial due to change of circumstances occurring without knowledge or participation of petitioner.

Blackstone called the right to jury trial ". . . the glory of the English law" and ". . . the best preservation of English liberty."[3] As a matter of fact, until *Patton v. United States*, 281 U.S. 276 (1930), it was unsettled as to whether a defendant in a federal criminal proceeding could ever waive a jury trial. The *Patton* case served as foundation for Rule 23 of the Federal Rules of Criminal Procedure, and generally held that the right to a jury trial is for the benefit of the accused and is not a structural component of the framework of government, and that a jury trial is not necessitated by public policy consideration. It was further added in the *Patton* case, respecting waiver, to wit:

> ". . . the duty of the trial court in that regard is not to be discharged as a mere matter of rote,

[3] 65 Yale Law Journal 1032.

but with a sound and advised discretion, with an eye to avoid unreasonable or undue departure from that mode of trial or from any of the essential elements thereof, and with the caution increasing in degree as the offenses dealt with increase in gravity."

Patton v. United States, supra page 312.

It is suggested, therefore, that if waivers are to be granted as a matter of intelligent discretion, with a view to preserving the fundamental jury trial right, then certainly a withdrawal of a waiver requesting this cherished privilege ought to be looked upon as favorably as possible, depending upon the circumstances. Even the rule requiring written evidence of a defendant's intent to waive jury trial is intended to insure a greater probability of a defendant understanding the waiver of the right to a trial jury. *Pool v. United States*, 344 F. 2d 943 (9th Cir. 1955), *cert. denied*. In fact, the right to a jury trial is so fundamental that the erroneous denial was acted upon by our appellate court irrespective of the failure by a defendant to raise the question. *Hatchett v. Governor of Guam*, 212 F. 2d 767 (9th Cir. 1954). It is interesting to note in this and many other opinions the great extremes the courts will go to before permitting a waiver of jury trial. It would seem that the same care should be exercised in permitting a withdrawal of the waiver of jury trial if there is substance to the defendant's position in order to permit the use of such a fundamental right.

The opinion in *Patton v. United States, supra*, page 312, further stated: ". . . trial by jury is the normal and with occasional exceptions the preferable mode of

disposing of issues of fact in criminal cases above the grade of petty offenses" and that a waiver must be with the "express and intelligent consent of the defendant."

The Supreme Court discusses over and over again the efforts taken to disavow waivers of fundamental constitutional rights. See, for example, *Johnson v. Zerbst*, 304 U.S. 458, 464:

> "It has been pointed out that courts indulge every reasonable presumption against waiver of fundamental constitutional rights and that we do not presume acquiescence in the loss of fundamental rights. A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege. The determination of whether there has been an intelligent waiver of right to counsel must depend on each case on the particular facts and circumstances surrounding that case, including the background, experience and conduct of the accused."

See, also, *Adams v. United States*, 317 U.S. 269, 278.

In *Leonard v. United States*, 231 F. 2d 588, concerning withdrawal of a plea of guilty previously accepted by the trial court, the Circuit Court of Appeals held that the defendant's motion for leave to withdraw the plea of guilty to the indictment should have been granted. The court made this comment of interest—

> "The fact that appellant did not show that he had a defense to the charge or the fact that he might, or probably would, be found guilty by a jury, is not significant here. We are concerned only with his right to have a jury trial. . . ."

Leonard v. United States, supra, page 591.

Turning now to cases dealing with the direct question of withdrawal of waivers of jury trials, there are few cases on appeal of such requests during the course of the trial, although there are several cases relating to withdrawal prior to the commencement of the trial. *People v. Melton,* 125 Cal. App. 2d Supp. 901; *People v. Osman,* 195 Cal. App. 2d 151. As a rule, courts have been most lenient in permitting withdrawal of waivers prior to the trial without a showing of prejudice by the defendant, but the criteria for permitting withdrawal after commencement of trial or directly before trial seems to be a comparison of the prejudicial effect to the defendant of the denial of the right to jury trial and the interference with the orderly processes of the court in the handling of criminal cases. In short, if the defendant can show prejudice, the courts are more inclined to grant the request for withdrawal. The case of *People v. Redwine,* 166 Cal. App. 2d 371, is in point.

In *Redwine,* involving a two-count indictment, the court went through the standard procedure in obtaining a waiver of jury trial from both defendant and his counsel, and the case was transferred to another department. At this time the waiver was again obtained, and subsequently the People offered to stipulate to submission of the case on the transcript of the preliminary hearing. This was stipulated by defense counsel, who further stated that he would like to cross-examine the complaining witness. The case was continued for trial, and after numerous attempts by the prosecution to obtain the appearance of the complaining witness for cross-examination, without success, the prosecution conceded that this witness could not be obtained. The court thereupon indicated that it would handle the

matter by deleting the testimony of the complaining witness from the preliminary transcript in its consideration. This was not agreed to by defense counsel, who then made a motion to be relieved of the waiver of trial by jury. The motion was denied, with the court indicating that the testimony of the complaining witness would be stricken from the record and not considered. The defendant was thereafter found not guilty of Count I and guilty of Count II. The appellate court stated, in part:

> "A stipulation for the waiver of the right of trial by jury should be strictly construed in favor of the preservation of the right. . . . 'Having in mind the sanctity of the right to trial by jury in criminal cases and the evident purpose of the constitutional provision that no defendant should be deprived of that right unless he unequivocally and personally expressed his consent to such waiver in open court, we have concluded that such waiver must be expressed by the defendant in the manner which can involve no question of misinterpretation, doubt or uncertainty at the time or afterwards.' "
>
> *People v. Redwine, supra,* pages 376-377.

Furthermore, the court said counsel for defendant was denied the right of cross-examination, and the improper denial of the right of cross-examination is a denial of due process. Where the subject of cross-examination concerns the matter at issue, the refusal to permit it results in a denial of a fair hearing and prejudice must be presumed. The court concluded that under the circumstances of the case, discretion was abused, to defendant's prejudice, in denying his motion to be relieved of his waiver of a trial by jury.

It is submitted that the analogy to this case is significant and that, accordingly, the request for withdrawal of the waiver in the instant case should have been granted. The effective waiver by petitioner was done and concurred in by counsel with the reasonable belief that husband and wife would present a united front and that the defense would be handled by the wife taking the stand and discussing freely the participation of each in the use and receipt of the contraband. Never, it is represented, would petitioner have waived jury trial if the change of plea could have been forecast. The defense of lack of knowledge of receipt and lack of criminal intent after receipt of the parcel was finished by the change of plea amounting to an extrajudicial confession. Prejudice to petitioner's case is evident, and the real question is whether in balancing the interests of the government and the individual the waiver should have been permitted to be withdrawn. The only demonstrable hardship to the government or the court is the loss of one day, for there are no facts to indicate any other reason not to grant petitioner's request. The right of withdrawal of the waiver should have been granted upon the facts of this case and possibly even more so when considering that petitioner is a foreign born national. The court found itself trapped by the action of the United States Attorney, and in so serious an offense trial by jury should have been permitted.

The plea of guilty by defendant Toni Sadrzadeh represents a complete confession. However, in the cases where there is a co-defendant the courts have usually held that proper precautionary instructions cover any potential problem, unless undue emphasis is placed upon the fact that such pleas have been made. *Koolish*

v. United States, 340 F. 2d 513; *United States v. Restaino,* 369 F. 2d 544, 545; *Payton v. United States,* 222 F. 2d 794. However, see the language in *United States v. Kahn,* 381 F. 2d 824, 833 (1967), *cert. denied:*

> "Absent aggravating circumstances, such as an incurable direct, stated or *necessary implication of the guilt of other defendants by the pleader,* or the failure of the trial judge to give the jury cautionary instructions, we hold that the acceptance of a guilty plea by an aider-abettor without declaration of a mistrial is not error. Without a convincing demonstration otherwise, it is presumed that clear and cautionary instructions are curative." (Emphasis added.)

The case before this Court has a different twist, for here the change in plea was made directly after testifying at length as to knowledge and use of the contraband, prior receipt, complete involvement of petitioner husband, and finally, lack of knowledge by both of the contents of the suitcase. Directly thereafter, the same testifying person turns around and confesses, indicating guilty knowledge to the trier of fact, who, at this particular moment, has assumed the role of judge.

Considering this more in the nature of a due process category or one of essential basic fairness, as was said in *People v. Aranda,* 63 Cal. 2d 518, 525:

> "Whether or not it is constitutionally permissible, the practice is prejudicial and unfair to nondeclarant defendant and must be altered."

While it will certainly be argued that this was a court trial and the court is in a better position to make the

necessary distinctions, it is difficult to imagine that such can be the case under the circumstances previously described. It seems especially so wherein lie detector tests were requested, and where the testimony of defendant Toni Sadrzadeh so strongly involved appellant, even though at the time attempting to do so claiming innocence and a lack of knowledge.

There is an analogy of sorts to Rule 14 as amended, dealing with prejudicial joinder. In *Simms v. United States*, 405 F. 2d 1381, the court there quotes approvingly the comment to the amended rule:

> " 'a defendant may be prejudiced by the admission in evidence against the co-defendant of a statement or confession made by the co-defendant . . . limiting instructions to the jury may not in fact erase the prejudice.' "

And there is, of course, the famous comment by Judge Hand in *Nash v. United States*, 54 F. 2d 1006, 1007 (2d Cir. 1932), *cert. denied*, 285 U.S. 556, that a cautionary instruction is a "recommendation to the jury of a mental gymnastic which is beyond not only their powers but anybody else's." This language is also quoted in *Bruton v. United States*, 391 U.S. 123, and it could well seem to imply that even an experienced court as a trier of fact is not immune from the prejudicial effects of certain forms of matter coming into the trial. Indeed, it is clear without necessity of citation that cases involving prosecutor misconduct in court trials have been reversed because of incurable prejudice going to the basic elements of fairness in the handling of criminal prosecutions. Again, as has been stated, this was a court trial and it can be argued that there is less prejudice in such a situation; how-

ever, it can also be argued that there may actually be more prejudice to this petitioner under these facts concerning the implication to petitioner of defendant Toni Sadrzadeh's guilty plea and the judge's acceptance of that plea prior to the conclusion of the case.

Moreover, the right of appellant to effective cross-examination should also be considered. See, *California v. Green,* 399 U.S. 149; *Douglas v. Alabama,* 380 U.S. 415; *Townsend v. Henderson,* 405 F. 2d 325 (6th Cir. 1968); *O'Neil v. Nelson,* 422 F. 2d 319 (9th Cir. 1970); *Santoro v. United States,* 402 F. 2d 920 (9th Cir. 1969). Generally, the cases formulate the rule that the test for allowance of an extrajudicial confession is the opportunity for full cross-examination. Obviously, in this case, when Toni Sadrzadeh originally took the witness stand, she was a friendly co-defendant, and that after her guilty plea, the motives and purposes for any cross-examination by petitioner would be drastically different. In this context, the opportunity for effective cross-examination never became available. Therefore, the full right of confrontation guaranteed by the Sixth Amendment was not present, and from a due process standpoint fairness was obviated by the lack of proper cross-examination.

It is pellucid in this case, from the comments of the court, that the court not only accepted the guilty plea of defendant Toni Sadrzadeh but also relied on a portion of her testimony in convicting petitioner. If this is correct, then the denial of an opportunity to cross-examine this defendant after her plea, when the situation, motives and purposes were substantially changed, did deprive petitioner of an opportunity for effective cross-examination

The issues tend to blend into each other, with the fundamental question going back to whether the request for withdrawal of the jury trial waiver should have been granted. It now would seem that the equities of the parties warranted the granting of the request.

II.

This Court Should Grant Certiorari to Determine Whether Petitioner Was Denied His Constitutional Rights to Due Process and a Fair Trial by the Trial Court Determining That It Did Not Have Discretion to Order an Independent Lie Detector Test or to Permit Petitioner to Introduce Into Evidence the Results of a Lie Detector Test Taken by Him in View of the Circumstances and Facts of the Case.

The trial court erroneously concluded that it did not have the discretion to admit the petitioner's evidence as to the results of a lie detector test taken by petitioner.

It is submitted that although the trial court was not bound to exercise its discretion in favor of the admissibility of the test results, it was, however, compelled to exercise its discretion, and the trial court's belief that it had no discretion to exercise was erroneous and precluded petitioner from having a fair trial and from introducing evidence on his behalf.

Originally, petitioner and his co-defendant wife requested lie detector tests [RT 12-13]. The government objected, stating:

> "The government's position as to lie detector tests would be that we oppose a lie detector test, because of the difficulty in demonstrating the scientific accuracy of such a test" [RT 13].

That the trial court felt that it had no discretion to exercise is evident by its statement:

> "Well, I have had this question before and my recollection is, without studying the law, is that you can't utilize a lie detector test unless it is stipulated to". [RT 13].

During the trial, counsel for petitioner moved the court to order a lie detector test of petitioner on its own motion.

The court, again obviously believing that it lacked discretion on the question, replied to the request by stating:

> "I don't think I can do it." [RT 211].

and after a brief colloquy, pointed out:

> "You see, the lie detector isn't sufficiently accurate. That is one of the reasons."

Petitioner thereupon sought to introduce the results of a lie detector test taken by him and the following colloquy then ensued [RT 212]:

> "MR. SHERMAN (Counsel for petitioner) The next motion I would make before the court is this: I would like to place before the court or make an offer of proof and obtain as a witness the party who conducted the lie detector test and place that evidence before the court. I would like—
>
> THE COURT: If you want to make an offer of proof, you may make an offer of proof.
>
> MR. SHERMAN: The offer of proof would be, your Honor, that the party who took the test, under my particular auspices,—
>
> By the way, do I understand the Court, on its own motion, will not order a lie detector test, even if I have it paid for by the defendant?

THE COURT: No, I will not order it. I don't think I have the authority to order it. I don't think it is admissible, that is just the point.

Why order it if it is not admissible? I don't believe the lie detector test is admissible, without the Government's approval, or stipulation." [RT 214-215].

Counsel for petitioner thereupon made an offer of proof stating:

"I would further offer to prove to the court and would so offer as testimony the testimony of my client, indicating, first, he is prepared to undergo a lie detector test under his own expense, through Court auspices, or through the Government.

Second, he has previously undergone a lie detector test through a recognized polygraph expert.

Third, that this polygraph test, which he has undergone, was successfully completed and successfully passed, and that the information from that polygraph, if offered to the court, would substantiate the defendant's position, that he had no knowledge of the particular package that was going to be received that particular—that he had no knowledge that the package that was received, which is the source of the crime involved in this particular case as alleged by the Government, had any contraband or hashish in it.

I would further offer to prove that the party conducting the test was a recognized polygraph expert in the field. I would further offer through proper testimony the fact that polygraph testing as such, since the most recent decisions on poly-

graph tests, have scientifically improved, and that any consideration as to the admissibility or lack of admissibility would go to the weight as opposed to the admissibility per se." [RT 216-217].

The trial court denied the motion [RT 217]. It is evident from the court's comment that it believed that it lacked discretion to admit the results of the lie detector tests given to petitioner despite the offer of proof, and whether or not the offer of proof might have established the said results to be admissible since the court stated, prior to counsel for petitioner making the above quoted offer of proof:

> "You make your offer of proof and then always on appeal you can make your point. If the higher courts change the rule and say it is an abuse of due process, why, well and good. I don't think it is at this stage of the law and I am not going to try to change it." [RT 25][4]

The trial court erred in doubting its discretion. We believe the rule to be that the determination of whether a scientific test has received general acceptance by recognized experts in the field so as to justify the admission of expert testimony based upon the results of the test *is primarily a question of fact for the trial court.* (See *People v. King,* (1968) 266 Cal. App. 2d 437, 433; *Huntington v. Crowley,* 64 Cal. 2d 647, 656; *People v. Busch,* 56 Cal. 2d 868, 878; *State v. Cary,* 49 N.J. 343 [230 A. 2d 384, 389]).

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[4]Although the motion was technically denied *after* counsel for petitioner had concluded making his offer of proof [RT 217], the motion was already effectively denied earlier, and the offer an idle act, since the court made this statement *prior* to its hearing or considering the offer of proof.

Thus, no discretion was exercised by the Court since it had not yet even heard the nature of the proof.

Professor Wigmore has stated the rule as follows:

> "When the testimony thus appearing to the ordinary layman to lack a rational basis is founded on observations made with esoteric methods or apparatus . . . the method should be explained by the witness, and if it be vouched for as accepted in his branch of learning, it suffices to admit his testimony." (*Wigmore on Evidence*, 3rd Edition, Section 659).

It has been pointed out that the trial court enjoys considerable latitude in determining the qualification of an expert. (*Huffman v. Lindquist*, 37 Cal. 2d 465, 476 [234 P. 2d 34]).

As the Court of Appeals for the District of Columbia pointed out quite some time ago, in *Frye v. United States*, (C.A.D.C. 1923) 293 Fed. 1013, 1014:

> "Just when scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be established to have gained general acceptance in the particular field where it belongs".

The admissibility of the results of the use of the "Harger" Breath Test for measuring intoxication was considered by the Texas courts in *McKay v. State*, (1950) 155 Tex. C.R. 416; 235 S.W. 2d 173, 175 and the "general scientific acceptance" criteria was ap-

parently rejected, the court holding that the objection to the introduction of the test results goes to its weight not to its admissibility.

Professor McCormick points out that the practice approved in *McKay v. State, supra,* is apparently the one followed in respect to expert testimony and scientific evidence generally. He points out that:

> "'General scientific acceptance' is a proper condition upon the court's taking judicial notice of scientific facts, but not a criterion for the admissibility of scientific evidence. Any relevant conclusions which are supported by a qualified expert witness should be received unless there are other reasons for exclusion. Particularly, its probative value may be overborne by the familiar dangers of prejudicing or misleading the jury, unfair surprise and undue consumption of time. On this footing the novelty and want of acceptance at that time of the lie detector lessened the probative value of the test and probably heightened the danger of misleading the jury. If the courts had used this approach, instead of repeating a supposed requirement of 'general acceptance' not elsewhere imposed, they might have arrived at some practical way of utilizing a technique of investigation which has proved so fertile as a means of ascertaining truth." (*McCormick on Evidence*, Chapter 20, Section 171, Hornbook Series, 1954).

The trial court thus should have, first, permitted the testimony of the expert witness who administered the lie detector test to petitioner with respect to the scientific basis for the reliability of the test, and there-

after, exercised its discretion in admitting or rejecting the results of the test based upon the foundation laid by the petitioner.

III.

This Court Should Grant Certiorari to Determine Whether Petitioner Was Denied His Constitutional Rights to Due Process and a Fair Trial by the Trial Court's Failure to Exercise Its Discretion on the Question of Admissibility of the Results of a Lie Detector Test Taken by Petitioner.

In a notable New York case, the trial judge permitted the introduction of the results of a lie detector test given on behalf of the accused and overruled the state's objection, thus upholding the admissibility of lie detector tests. (See *People v. Kenny,* 167 Misc. 51, 3 N.Y.S. 2d 348 (C.E. Ct. 1938) where a strong foundation was laid for the scientific basis and reliability of the test given by a professor at Fordham University).

The California Court of Appeal, in upholding a trial court's refusal to admit lie detector evidence in *People v. Wochnick,* (1950) 98 Cal. App. 2d 124, 127; 219 P. 2d 70, pointed out, in a case of first impression, that other jurisdictions have uniformly sustained the trial court's rulings in refusing to admit evidence of lie detector examinations sought to be introduced by a defendant. Thus, the trial court's refusal to admit the results of the tests in the exercise of its discretion, will be upheld on appeal, but the cases wherein the trial courts were so upheld involved situations where the courts *resolved their discretion* against admissibility.

Here, the trial court *did not* exercise its discretion after a review of the proffered evidence, and determine that it was inadmissible. Rather, the trial court, believing that its hands were tied, resolved the issue against the petitioner not by an enlightened exercise of its discretion, but by a failure to exercise any discretion at all.

A test of an abuse of discretion has been held to be failure to exercise discretion. As we have pointed out, the question of whether the results of the lie detector tests given to petitioner were admissible rested within the sound discretion of the trial court. The trial court expressed its belief that it did not have any discretion to exercise. The trial court's view that it had no discretion was erroneous, and its failure to exercise its discretion constituted an abuse of that discretion.

It has been pointed out that if the trial court has refused or failed to exercise a discretion vested in it, as on the supposed ground of want of power, the judgment will generally be reversed to the end that the discretion shall be exercised. (See 58 *Corpus Juris Secondum* 40; *Richardson v. Persons,* 77 A. 2d 842, 116 Vt. 413; *McCutcheon v. Leonard,* 39 A. 2d 348, 114 Vt. 38; *Long v. George,* 7 N.E. 2d 149, 296 Mass. 574; *Daly v. Blair,* 150 N.W. 134, 183 Mich. 351, overruling *Polhemus v. Ann Arbor Savings Bank,* 27 Mich. 44; *State v. Wynne,* 204 S.W. 2d 927, 356 Mo. 1095; *Tilton v. Beecher,* 59 N.Y. 176, 17 Am. R. 337; *Kohlman v. Hyland,* 219 N.W. 228, 56 N.D. 772; Corpus Juris Secondum quoted in *Bauer v. Heaton,* 38 N.E. 2d 413, 414, 68 Ohio App. 181; *Parkhurst v. Healy's Estate,* 122 Atl. 895, 97 Vt. 395).

Thus, while the petitioner was not entitled to have the trial court exercise its discretion in a particular

manner, he was entitled to have the court exercise it in *some* manner, and the trial court's belief that it had no discretion vested in it and its resultant failure to exercise its discretion at all with respect to the admissibility or non-admissibility of the lie detector tests, constituted reversible error.

IV.

Assuming, Arguendo, That a Trial Court Has No Discretion to Admit the Results of a Lie Detector Test Taken by a Defendant Into Evidence, the Court Should Grant Certiorari to Determine Whether the Results of a Lie Detector Test Taken by a Defendant May Be Received Into Evidence Provided That a Proper Foundation Is Laid for the Introduction of Such Test Results.

Professor McCormick, as long ago as 1954, concluded that the simple doctrine of wholesale exclusion of lie detector evidence seemed an inadequate solution based upon estimates of acceptance and reliability which were no longer valid and that courts should substitute a standard of discretion for the rule of exclusion. The dissertation of Professor McCormick with respect to lie detection evidence as contained in *McCormick on Evidence* (Hornbook Series 1954), pages 369-373, is most enlightening, and we submit that the conclusions contained therein are most valid. A copy of Professor McCormick's work on this issue is incorporated herein and set forth in "Appendix B" hereof, and made a part of this petition.

Professor Wigmore had occasion to comment upon the value of the polygraph over 35 years ago. In his volume entitled *A Student's Textbook of the Law of*

Evidence (The Foundation Press, Inc. (1935)), he commented:

> "Psychometry, however has devised a simple apparatus—the cardiograph, or polygraph, or 'lie detector'—by which the falsities in a witness' story can be readily and decisively revealed. The apparatus proceeds upon the established physiological truth that all conscious emotional changes, even the slightest, are coincident with changes of blood pressure and respiration; that these changes are beyond the person's control; and that they reveal themselves in the pulsations and can therefore be recorded.
>
> This apparatus is of invaluable service in police or other extra-judicial investigations. It is perhaps not yet serviceable in the peculiar environment of a public trial. Moreover, it can be dependably used by highly qualified experts only."

Perhaps, after 35 years, the polygraph is now serviceable in the environment of a public trial.

The courts have moved slowly in the direction of permissibility in the area of lie detector tests, and it is respectfully requested that this Court review the respectability of such testing. The scope in today's world of the use of polygraph testing does not have to be stated in detail, nor does it seem that its vital function in law enforcement would have to be further commited upon. We respectfully refer the court to the affidavit of Warren King attached to petitioner's Motion for New Trial [CT 55].

If it is the law that a defendant may not introduce the results of a lie detetor test to prove his innocence or state of mind without the consent of the prosecutor, the net effect is to vest the government with a veto power over the search for truth. Recent years have seen radical changes in the theories regarding opinion evidence to the extent that California law now specifically provides that opinion evidence may be given concerning the ultimate facts in issue in a case. (See California Evidence Code, Section 805).

Indeed, the Federal system has not remained silent either. Rule 7-02 of the Proposed Rules of Evidence (46 F.R.D 161) proposes:

> "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by special knowledge, skill, experience, training, or education, may testify thereto."

Rule, 7-03 of the Proposed Rules of Evidence (46 F.R.D. 161) proposes:

> "The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence."

The opinion of an expert qualified in the administration of a lie detector test as to the results of that

test insofar as a defendant's innocence or state of mind are concerned, would appear to be admissible, although the answer itself would be an opinion on the ultimate fact in issue, by virtue of Rule 7-04 of the Proposed Rules of Evidence (46 F.R.D. 161) which states:

> "Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact:"

The opposition to the use of the lie detector test rests, of course, upon the reliability of the test itself, and yet we take for granted the right of doctors to state their opinions in all types of medical matters. This right exists, although the cross-examiner learns quickly to ask the doctor whether medicine is an art or a science. We permit lay people to testify regarding intoxication, sanity, speed of vehicles, and value. We permit police officers to testify to various tests, and we permit experts to testify regarding demonstrations in all forms of product liability cases. And yet, with all of this, the courts will still not permit a polygraph expert to state his opinion after such testing. The point is that what the law has developed, and is fundamental to litigation, is the art of cross-examination to place before the trier of fact the inherent weakness of either the individual testifying or the weakness of the very test itself. This is the safety of admissibility, together with proper judicial discretion.

It is suggested that we have reached the stage where, depending upon the particular case and the particular

facts, discretion should be placed more in the hands of the court than in the prosecutor. A crack in this door may have been opened by the wording of *United States v. Wainwright*, 413 F. 2d 796, 802-803 (10th Cir. 1969):

> "The thrust of Wainright's argument is that in the ten years since *Marks*, the 'state of the art' of polygraph testing has improved to the point that the accuracy of such tests equals that of such commonly admissible evidence as results of handwriting tests, psychiatric opinion evidence, and alcohol blood tests. But leaving to one side the numerous reasons advanced for rejecting polygraph results, the argument has no force in our case.
>
> "Despite the periodical literature cited relating to the reliability of polygraph testing, Wainwright laid no predicate for the admissibility of this evidence. Without doubt, matters of factual proof must keep pace with developing scientific standards. And rules of evidence exist to assist the jury in arriving at factual conclusions. But no judgment can be made without relevant expert testimony relating to the probative value of such evidence. Wainwright totally failed to supply the condition noted by Wigmore that before such evidence be admitted an expert testify 'that the proposed test is an accepted one in his profession and that it has a reasonable measure or precision in its indications'. 3 Wigmore on Evidence (3rd Ed. 1940) § 990. The trial court properly excluded it even though in a proper case it may be admissible."

The deficiency referred to in the *Wainwright* case does not exist in the facts before this court. Unlike *Wainwright*, petitioner herein did proffer relevant expert testimony relating to the prohibitive value of the lie detector evidence. We therefore suggest that this was the "proper case" in which such evidence may be admissible."[5]

We most respectfully urge this court to reconsider the existing rules with respect to the admissibility or non-admissibility of the results of lie detector tests, and to hold that when a proper foundation is laid, the trial court must exercise its discretion and admit the results of such tests; the results thereof going to their weight in evidence rather than to their admissibility.

Even in the area of the newly developed voiceprints the courts in Connecticut, New York, and New Jersey have allowed this evidence as exclusionary evidence to clear suspects in criminal charges. There are numerous books, periodicals, and articles substantiating the validity and use of the polygraph testing. See, for example, the following: Truth and Deception by Imbau, 1966; the hearings before the subcommittee on the use of polygraphs as lie detectors by the Federal Government of

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[5]See also *United States v. Tremont,* (6th Cir. 1965) 351 F. 2d 144, where the court was asked to re-appraise the rule on admission of lie detector evidence but declined to do so because, "nothing appears to have been offered to the trial court to offset the long-standing judicial distrust of such evidence, and we are not ourselves prepared to re-examine the traditional rule in a case thus presented". Thus, the door to the reception of lie detector evidence has been closed only by virtue of the absence of foundational proof at the trial level. Here, however, the trial court failed to even consider petitioner's offer of proof.

the House Committee on Governmental Operations, 88th Congress, 2nd Session, Part 1; Lawyers' Medical Journal on Polygraph Technique, Vol. 4, Feb. 1969; 39 Cal. Law Review 549; 37 Harvard Law Review 1138; 11 Journal Criminal Law & Criminology, page 551; 33 Yale Law Journal 771; 24 Columbia Law Review 429.

The key element in this case is state of mind. The defense is lack of knowledge and no criminal intent. The evidence is possession in the apartment and florescent powder all over petitioner's hands. The difficulty of proof for petitioner is obvious. In such a case, involving deportation and a minimum jail sentence of five years, the reasons seem clear that the court, in its wisdom, should have the final right to decide the admissibility of the evidence in the search for truth, subjecting always that evidence to complete and through cross-examination. This Court is most respectfully requested to reconsider the guidelines to be applied respecting the admissibility of polygraph tests through the testimony of recognized polygraph experts. The point is that a veto by the prosecutor should not be the answer. Possibly the guidelines should permit a veto only of the expert of the defendant, with the prosecution having the right to use its own experts, or an independent expert suggested by the court to be paid for by the defendant. As noted in the Affidavit of Warren King, and as is common knowledge, polygraph testing has been used in paternity cases and other domestic squabbles for some time by trial courts.

V.

This Court Should Grant Certiorari to Determine Whether Petitioner's Constitutional Rights Under the First and Fourth Amendments Were Infringed by the Obstruction and Delay of the Flow of United States Mail Not Incident to Either the Investigation or Arrest of Petitioner and Whether Petitioner's Motions Below to Dismiss and to Suppress Evidence Should Have Been Granted.

The suitcase sent through the mail was discovered with the contraband on November 20, 1969 by the U.S. Customs officials and on that date brought to the attention of the Special Investigator. The contents were chemically analyzed on November 21, and on November 25 the false bottom was repaired. Prior to November 25, on an uncertain date, a trip was made to petitioner's apartment area. Thereafter, on November 29, the suitcase was set up for delivery through the Post Office Department and a search warrant obtained.[6] It is appellant's position that there was no reasonable excuse for the delay in the investigation, the interruption of the mail, and the failure to act immediately on the information obtained through the investigation. The following occurred in response to questions in the transcript [RT 79:4-82:6]:

> "Q. You also went then and obtained a search warrant for this particular premises, is that right, and that search warrant was dated November 29, 1969, is that correct?
>
> A. Yes.
>
> Q. Now, may I ask you, sir, why you did not obtain a search warrant on November 21, 1969?

[6]Page references to the above are set forth in the Statement of Facts.

A. A search warrant for what?

Q. For searching the premises.

Mr. O'Neill: Objection, your Honor, irrelevant.

The Court: Well, it may be. I will let him answer it.

By Mr. Sherman:

Q. Was there some reason you did not make arrangements for the delivery—

The Court: Suppression hearing. I want to hear it. All right.

Do you understand the question?

The Witness: No, sir, not exactly.

The Court: He wants to know why didn't you ask for a search warrant on November 21st. Why did you wait until November 29th for the search warrant? That is his question.

The Witness: Because that is the day the parcel was going to be delivered, is on the 29th.

By Mr. Sherman:

Q. You say it was going to be delivered. Is there a particular reason it was going to be delivered on that day?

A. No.

The Court: You mean that is the day you decided it would be delivered?

The Witness: Yes.

The Court: All right.

By Mr. Sherman:

Q. Was there some reason that you decided —strike that.

There was no reason this parcel could not have been delivered on November 21st, is that correct?

A. It wasn't repaired on that day, it wasn't in condition to be delivered on the 21st.

Q. Other than the repair, there was no reason the parcel could not be delivered on the 21st, is that a fair statement?

A. I think so, yes.

Q. At all times you had planned to deliver this parcel and to seize the parcel inside the residence, is that correct? That was your operation?

A. Yes.

Q. Was there some reason you did not obtain a search warrant before the 29th, inasmuch as you had the planned delivery already in mind?

A. I don't quite understand that question.

Q. You at all times had planned, whether it be the 20th or 21st, to deliver that parcel to the residence and to seize the parcel inside the residence? That was your mode of operation?

Mr. O'Neill: Objection, your Honor. I don't believe the witness testified it was his plan on November 21st to deliver it and seize it.

The Court: That is my understanding of it.

Is that right? When did you form this plan of delivering it and then making the search at the time, shortly after the delivery? Was it at the beginning?

The Witness: When we decided to deliver it on the 29th, yes.

The Court: When did you decide to deliver it the 29th?

The Witness: I suppose it was sometime after—or around the 25th, when we had it repaired.

The Court: All right.

By Mr. Sherman:

Q. Your normal operation in these type of cases is to deliver the package, is it not, and to seek out a search warrant?

A. Yes.

Q. And your normal operation in these kind of cases is to do it as expeditiously as possible, is it not?

A. Yes."

The point of petitioner's position is that the delay occasioned in this case was not incident to the investigation and the arrest but was an unwarranted delay and a wrongful interference with the flow of the mails and the constitutional rights of the recipient. In short, it was petitioner's argument that if there was delay in the delivery for a period of say six months or a year, there would be no question of the invasion of either First or Fourth Amendment rights. And to the same extent this theory should apply to a delay without excuse of three, four, or five days. In other words, the measure of the wrongful intrusion is not by how big or small it was, but whether it existed at all, and in this particular case the delay admittedly had to exceed the normal interference of the mail incident to investigation and arrest.

The argument was made that defendants were required to show prejudice to have standing to contest the unwarranted delay in the delivery of the mail; however, if this were the rule, it is doubtful that any recipient could ever have standing to object. It seems more consistent to say that it is the nudging of the basic right that is important rather than proof of prejudice in a criminal case. The case heavily relied upon by the government is *United States v. Beckley*, 335 F. 2d 86

(6th Cir. 1964). It is petitioner's view that this case is easily consistent with the arguments of appellant. In the *Beckley* matter the defendants were charged and convicted of smuggling, receiving and concealing marijuana which they knew had been imported into the United States contrary to law. Similar to the case before this Court, a package was received, searched by U.S. Customs, and a sample of contraband analyzed by Customs at the place of entry in Miami. The package was rewrapped, sent by air to Detroit, and the next day delivery was arranged to the home of the addressee, with a warrant thereafter obtained. The defendants claimed Fourth Amendment violation in the opening of the parcel without probable cause and the obtainment of a search warrant and, further, a violation of Title 18 U.S.C. §§ 1701-1703, having to do with unlawful delays and obstructions of the mails. The court held basically, to wit: (1) In dealing with probable cause and search warrants, Fourth Amendment standards were applicable to mail moving within the country but ". . . were not applicable to mail coming in from outside the country, at least where it appears that a Customs determination must be made." The court analogizes this situation to a border search. (2) The delay incident to the investigation and arrest, even though in violation of federal statutes both in delaying the package and failing to confiscate, would not be a basis for suppressing evidence; nor would the failure to place a seal on the package indicating it had been opened in violation of Treasury Department Regulation 19 C.F.R., § 9.5, be a proper basis for suppression of evidence. The court ruled in effect that the obstruction and delay of the mail was incident to the investigation.

It should be noted, however, that the basis in this case for petitioner's claim has nothing to do with the right of search and seizure by Customs or, for that matter, the violation of federal regulations and Treasury Regulations concerning the obstruction and detention of the package required by the investigation. The basis for petitioner's attack is the unreasonable delay after inspection that cannot be considered either incident to the investigation or incident to the arrest. It must be remembered in this respect that once the mail has been received in the country, it enters the routine domestic flow and should therefore be guided by the same basic principles. In short, the flow of mail to this country and detention may require certain standards, but after inspection, when the article is ready to enter the domestic flow, there seems no valid reason for this type of mail not to be guided by the basic principles concerning the flow of mail inside the United States. Even if this Court follows the *Beckley* views, it cannot be argued that *Beckley* stands for anything other than the right of Customs to open mail coming from out of the country and that delay incident to the investigation and arrest is authorized. In this context, the position of petitioner is certainly consistent with the views expressed in *Beckley*.

The decision of *United States v. Van Leeuwen*, (1970) 397 U.S. 249, is appropriate. In the *Van Leeuwen* case, defendant was tried and convicted of illegally importing gold coins. This Court stated, and we deem it pertinent to this case, the following, to wit:

> "The course of events since 1878 has underlined the relevance and importance of the Post Office to our constitutional rights. Mr. Justice Holmes in *Milwaukee Pub. Co. v. Burleson*, 255

U.S. 407, 437 (dissenting opinion), said that 'the use of the mails is almost as much a part of free speech as the right to use our tongues.' We have emphasized over and over again that while Congress may classify the mail and fix the charges for its carriage, it may not set up regimes of censorship over it, *Hannegan v. Esquire, Inc.*, 327 U.S. 146, nor encumber its flow by setting up 'administrative officials astride the flow of mail to inspect it, appraise it, write the addressee about it, and await a response before dispatching the mail' to him. *Lamont v. Postmaster General,* 381 U.S. 301, 306. . . .

"The only thing done here on the basis of suspicion was detention of the packages. There was at that point no possible invasion of the right 'to be secure' in the 'persons, houses, papers, and effects' protected by the Fourth Amendment against 'unreasonable searches and seizures.' Theoretically—and it is theory only that respondent has on his side—detention of mail could at some point become an unreasonable seizure of 'papers' or 'effects' within the meaning of the Fourth Amendment. Detention for 1½ hours—from 1:30 p.m. to 3 P.M.—for an investigation certainly was not excessive; and at the end of that time probable cause existed for believing that the California package was part of an illicit project. . . .

". . . the unavoidable delay in contacting the more distant of the two destinations, the distance between Mt. Vernon and Seattle—a 29-hour delay between the mailings and the service of the warrant cannot be said to be 'unreasonable' within the meaning of the Fourth Amendment."

Petitioner, in presenting this as error, has proper standing to object, although not the addressee or return addressee of the package. *Jones v. United States*, 362 U.S. 257 (1960).

It is respectfully submitted, therefore, that the delay was unreasonable and was a clear encroachment upon the First and Fourth Amendment rights of petitioner, who was the recipient of the package. Accordingly, while the search of the parcel can be justified, the independent rights associated with seizure cannot.

VI.

This Court Should Grant Certiorari to Determine Whether the Court Below Should Have Granted Petitioner's Motion to Suppress All Items of Evidence Excepting a Suitcase and Its Contents, in That:

A. There was no probable cause for believing the existence of the grounds on which the warrant was issued under Rule 41;

B. The property seized is not that described in the warrant pursuant to Rule 41(e) (3);

C. The delay in effecting the arrest was used as a method to justify an exploratory search of the apartment.

The usual procedure in the delivery of packages is to notify the recipient that the Post Office has received a package and the recipient then goes to the Post Office Department in the particular locality to pick up the package. In this case, the parcel was delivered and thereafter a broad search warrant was obtained authorizing a search of the defendants' apartment to search for a mail parcel—"known to contain approximately

5 pounds in marijuana and hashish form concealed within a false bottom of a suitcase within the mail parcel . . . ."

It is quite clear that prior to the search of the apartment and fluoroscoping the hands of petitioner there would have been no evidence whatsoever to justify petitioner's connection to the criminal activity, since petitioner was not the addressee of the package. It is obvious, then, that entry of the parcel into the apartment was the only means to enlarge the circle of implicated parties other than the addressee and the only means in which to attempt to find other evidence implicating the defendants. The delivery of the parcel to the apartment was therefore used to validate a full search of the apartment.

Rule 41 of Federal Rules of Criminal Procedure provides that one of the grounds for suppression of evidence is that there was no probable cause for believing the existence of the grounds upon which the warrant was issued in this case is that there was now being concealed certain property, including the mail package previously referred to, and "other equipment and paraphernalia used in the preparation, packaging and use of marijuana, and articles of personal property tending to establish the identity of the person or persons supplying these items to the persons in control of Apartment B . . . ." It is obvious from a clear reading of the warrant and the affidavits in support thereof that the only probable cause contained in the warrant is that gained from opening the mail package.

There is no basis whatsoever for the officers' belief that there was now being concealed equipment and paraphernalia and articles of personal property tending to establish the identify of the person or persons supplying the items.

Moreover, Rule 41(e)(3) of the Federal Rules of Criminal Procedure provides that one of the grounds for suppression of evidence is that the property seized is not that described in the warrant. Certain articles seized such as a suitcase, various papers, musical instruments, and other matter were not described in the warrant, and the court erred in not granting the motion to suppress and for return of all items except the specific contraband described in the search warrant. It is axiomatic that a valid search warrant does not give searching officers complete authority to make a general exploratory search of premises for incriminating evidence. *United States v. Lefkowitz,* 285 U.S. 452 (1932). A comparison of the property described in the search warrant in this case with the inventory of property taken pursuant to the warrant clearly discloses that the items seized were not particularly described in the warrant as required by law.

It is petitioner's position that the procedure for delivery of the parcel to the apartment was a method by the authorities to gain access to the apartment for a general exploratory search in an attempt to find incriminating evidence and bring petitioner within the orbit of involved persons.

VII.

This Court Should Grant Certiorari to Determine Whether Petitioner's Constitutional Rights to Due Process and a Fair Trial Were Violated by the Prosecutor Placing Certain Prejudicial Evidence Before the Trier of Fact.

In the search of the apartment there was found by the agents, three letters, two addressed to petitioner and one addressed to his wife, Toni. These letters were taken as evidence and formed a part of the inventory [RT 83]. When the court denied the motion to suppress, the court denied it in its entirety and did not permit the return of any item taken by the agents. Thereafter, during the course of the trial, pursuant to the stipulation of the parties, the three letters were offered into evidence as Government Exhibits 10, 11, and 12. Specific objection was made by petitioner to these letters—not written by either of the defendants [RT 146]. After a discussion as to what might be in the letters, the court denied their admissibility, indicating that the United States Attorney was anticipating a defense, to which the United States Attorney agreed [RT 150]. Thereafter, in cross-examination of defendant Toni Sadrzadeh, the United States Attorney asked the following question:

> "Q. Have you ever had any communication with Joan Meolovitch regarding the sale narcotics either to her or a purchase of narcotics from her?" [RT 199-200].

There is then a dialogue between counsel and the court relating to the admissibility of the letters and the con-

tents of the letters, with the court finally sustaining the objection [RT 203]. The United States Attorney then made an offer of proof and stated that Mrs. Sadrzadeh received a letter from Miss Joan Meolovitch where quantities of 10 to 20 kilos of an unidentified substance were referred to for Mrs. Sadrzadeh. At this point, petitioner made a motion for a mistrial on the basis that the offer of proof was prejudicial, especially in view of the fact that the United States Attorney had no intention of producing the sender of the letter as a witness.

Furthermore, regarding the offer of proof, the United States Attorney knew that the particular letter did not state what was indicated in the offer of proof [See Government Exs. 10, 11 and 12 for identification]. It is the position of petitioner that in the first instance the court should not have denied the motion to suppress in its entirety and should have permitted return of these particular items and suppressed these letters. Moreover, it is the position of petitioner that the United States Attorney was well aware of the prejudicial effect of the letters, knew that the witness was not available, and misstated the contents of the letters in the offer of proof. While it is recognized that this was a court trial and this type of error can be overlooked, yet, in combination with all other factors in this case, it is submitted that a fair trial was not obtained by petitioner.

VIII.

This Court Should Grant Certiorari to Determine Whether the Government Established That the Substance Involved in the Case Was Contraband.

It was stipulated that the chemist, if called to the witness stand, would testify that the contents of the plastic bags in Exhibit 14 contained hashish and that each bag weighed approximately one pound [RT 144-145]. There was no other proof offered that the substance was contraband as defined by 21 U.S.C. § 176a.

> "Section 176a specified that for the purpose of that section, marihuana is defined in Section 4761 of the Internal Revenue Code of 1954:
>
> " 'The term "marihuana" means all parts of the plant *Cannabis sativa L.*, whether growing or not; the seeds thereof, *the resin extracted from any part of such plant;* and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds, or resin * * * 26 U.S.C. § 4761(2).' (Emphasis added.)"
>
> *United States v. Cepelis,* 426 F. 2d 134, 136 (1970).

Moreover, the text of the *Cepelis* case with regard to the presumption defined in *Leary v. United States,* 395 U.S. 6, 10, 89 S. Ct. 1532, was not met in the verdict rendered by the court.

IX.

The Court Should Grant Certiorari to Establish Whether the Violation of Postal and Customs Regulations Virtually Created the Crime and the Criminal, and Whether the Government Should Thereby Be Estopped From Prosecution.

This contention is to be differentiated from an attempt to suppress evidence because of government violations of its own statutes and regulations. In this regard, *United States v. Beckley, supra,* and *United States v. Sohnen,* 298 F. Supp. 51 (E.D. N.Y. 1969) will be distinguished.

In *Alexander v. United States,* 362 F.2d 379 (9th Cir. 1966), the court enunciated the basic rationale for U.S. Customs searches. At page 382, the court said:

> ". . . the primordial purpose of a search by Customs officers is not to apprehend persons, but to *seize contraband property* unlawfully imported or brought into the United States." (Emphasis added.)

With the above in mind, 19 U.S.C. §§ 482, 1499, and 1581 become unusually literal. 19 U.S.C. § 482, in mandatory language (*i.e.*, "shall seize"), calls upon Customs officials to seize contraband material. To the same effect is 19 U.S.C. § 1499. 19 U.S.C. § 1581 (e) is even more to the point; again the repetition of the mandatory language calling for the seizure of merchandise.

And pursuant to the authority of these statutes are the Customs regulations of Title 19 and Title 39. In 19 C.F.R. § 9.12(d), dealing *specifically* with importation *by mail of prohibited matter,* the regulation

states, in unequivocal language, the duty of Customs officials:

> *"In all cases* where articles are seized by customs officers, *notice shall be given* by customs officers to the addressee of that fact and the reason therefor." (Page 152 of 19 C.F.R.; emphasis added.)

That same section also *requires* seizure:

> "All mail shipments containing articles . . . which are prohibited . . . shall be immediately taken and held by customs officers for appropriate treatment under the customs laws." (Page 151.)

Additionally, 19 C.F.R., dealing with enforcement procedures, emanate, in great part, from the previously mentioned statutes—19 U.S.C. §§ 482, 1499, and 1581. And, again, the admonition is for seizure—not capricious acts of chicanery.

And, furthermore, the postal regulations are in virtual harmony with Customs, in that 39 C.F.R. 262.1 also calls for notice to the addressee of prohibited matter.

The point of the above is not simply that because there were violations of these sections, both statutory and administrative, the evidence should have been suppressed as attempted in the *Beckley* and *Sohnen* cases, *supra*. The point is that by ignoring these regulations—by failing to confiscate the contraband and instead sending it to a possibly unsuspecting addressee—the government itself became the cause of the illegal importation.

That such a theory is not mere intellectual flippancy can be attested to by certain portions of *United States v. Davis*, 272 F.2d 149 (7th Cir. 1959), on which,

parenthetically, both the *Sohnen* and *Beckley* cases rely. In the *Beckley* case, large portions of the *Davis* case are quoted; while the *Sohnen* case is content to merely cite it at page 57.

In the *Davis* case the argument was advanced that if there was a reasonable doubt that the government's activities caused the importation, then the defendant could not be found guilty. The opinion, at page 152, quotes approvingly the jury instruction:

> "'If, from the evidence you have a reasonable doubt as to whether or not the Government itself caused the marijuana referred to in the indictment to be imported into the United States, then you must find the defendant not guilty.'"

The appellate court accepted the validity of this theory, but simply found the instructions to the jury were adequate and that there was sufficient evidence to support the verdict. The *Davis* case, then, becomes authority for the validity of the theory advanced here.

In the present case the activities of the government placed a heavy burden on the petitioner to somehow deal with contraband material. Remembering that it was only one hour after delivery that the petitioner was arrested, the perverse and prejudicial nature of the government's activities becomes obvious.

To be considered is the nature of 21 U.S.C. § 176a. Since the statute has been read in the disjunctive (*i.e.*, one can be convicted of mere knowing concealment whether or not there is any proof of knowing importation), the methods of the government involved here wind up virtually reversing any presumptions of innocence and place an unfair burden on any recipient to deal with contraband in such a way that "knowing con-

cealment" becomes an impossibility. This is certainly not the intention of 21 U.S.C. § 176a nor the intention of 19 C.F.R. § 9.12(d)—this last apparently designed to explicitly *prevent* Customs officers from behaving in the manner which they did.

Returning, § 176a, despite interpretation in the disjunctive, is still ultimately an anti-smuggling statute. Somewhere along the line the separate parts should be read with some idea or connection to smuggling—or else the statute becomes close to a federal possession statute. If the prevention of smuggling be the overall policy behind 21 U.S.C. § 176, then the government, through its own machinations, guaranteed, facilitated, or what have you, an infringement of the smugglery statute—all in violation of its own prescriptions on how to deal with prohibited matter coming through the mails.

The statutes and regulations call for seizure; the government did not do this. The regulations call for notice to the addressee; the government did not do this either. What it did do, however, was make certain it would have some person to arrest. ". . . the primordial purpose of a search by customs officers is not to apprehend persons, but to seize contraband property . . ." *Alexander v. United States, supra.*

The difference between the procedures followed in this case and those involved in vehicle importation cases is obvious. In an automobile case, when a car is allowed to continue along its way to its destination, the government, no matter what happens subsequently, can always arrest the persons in the car—whether or not the ultimate destination involves an innocent or guilty party. The *Davis* case was just such a case. The court in *Davis* felt that the government should be allowed to

send the car to its ultimate destination; but not only can this activity be distinguished on the above reasoning but also because it involved no such flagrant violation of any regulations such as 19 C.F.R. § 9.12-(d). The point is that the court in the *Davis* case, in the absence of a federal regulation dealing specifically with vehicle importations, (besides seizure) felt this to be within the ambient of permissible police activity. But in the naked light of the regulations referred to here, which specifically dictate the procedures to be followed in mail importations of prohibited matter, this conclusion (and, incidentally, some of the props behind *Sohnen* and *Beckley*) cannot stand.

And lastly is the difference between domestic as opposed to international mail. Presumably, the government can always investigate the sender rather than the addressee. But, in this case, if the government followed its own regulations, it would be devoid of a criminal. Having no one to arrest, the government simply ignored its statutory and administrative mandates, thereby virtually assuring itself of a crime and a criminal.

In *Jones v. United States*, 368 F. 2d 795 (2nd Cir. 1966), the court there was faced with an analogous problem. That is, the defendant was convicted of a crime in a case where the violation of administrative regulations was a direct cause of the violation. On page 799, the court said:

> "Our decision rests on the principle that because the government has failed to follow its own regulations promulgated in the proper exercise of the Secretary of Treasury's discretion, its action can have no effect. . . . There is no novelty in hold-

> ing that where an official is given discretionary power by statute, promulgates regulations as to how the power is to be exercised and then fails to follow his own regulations, the action is of no effect."

To repeat (and hopefully not to bore), the Secretary of the Treasury has indicated exactly how, pursuant to statutory authority, importation of prohibited matter through the mails is to be handled. 19 C.F.R. § 9.12(d). Not only was this appellant hurt by these practices, but these practices ought not to be condoned by this Court in its capacity not only in the administration of criminal justice but, also, as violative of due process.

In view of all of the above, both the *Beckley* case and the *Sohnen* case can be distinguished.

Firstly, the *Beckley* case was only involved with the suppression of evidence; the argument here concerns the very crime itself. And *Beckley,* in so heavily relying on the *Davis* case, inadvertently supports the contention here. It will be remembered that the *Davis* case did support a theory similar to this one; that the actions of the government might preclude a conclusion that an act of illegal importation was ever committed by the defendant.

Secondly, a close look at the statutes and regulations referred to in the *Beckley* case indicates that they do not refer to the literal and clear statutes and regulations relied on here: 19 U.S.C. §§ 482, 1581, and even more specifically 19 C.F.R. § .12 and 39 C.F.R. § 262.1(a).

The *Sohnen* case is more interesting. At least that case refers to the full gamut of statutory and adminis-

trative regulations. On that count, there is no argument. But, despite its fairly clear and seemingly damaging holdings for the points raised here, the case ultimately is strong authority for the present argument.

In *Sohnen* a search of defendant's mail revealed what later turned out to be illegally imported gold coins. But in that case—and unlike the instant case—when the U.S. Customs officials discovered the suspected material, *they began an investigation of the addressee;* they did not precipitously send the coins on with agents watching a mailman from across the street. They put on a mail watch, followed the defendant, searched subsequent incoming mail, etc. In short, what they did never could be the basis for the theory presented here —that the acts of the government virtually created the crime. Furthermore, the *Sohnen* case presents an adequate alternative to the methods employed in the present case.

In conclusion, the *Davis* case refers to an estoppel theory; *i.e.,* there could be no conviction if insufficient evidence existed to find illegal importation. To the extent that the present argument is harmonious with *Davis,* it is adapted here. Whether it is called estoppel, or violation of due process, or prohibited activity in the administration of criminal justice, the actions of the government ought not to be condoned.

> ". . . the primordial purpose of a search by Customs officers is not to apprehend persons, but to seize contraband property . . ."
>
> *Alexander v. United States, supra.*

The argument is not with the right to conduct Customs searches, it is with the actions subsequent to that search.

Conclusion.

For the foregoing reasons this petition for a writ of certiorari should be granted.

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APPENDIX "A."

Opinion of the Court of Appeal for the Ninth Circuit.

United States Court of Appeals, for the Ninth Circuit.

United States of America, Plaintiff-Appellee, v. Seyed Mohammed Sadrzadeh, Appellant. No. 26,304. Filed: April 9, 1971.

On Appeal from the United States District Court for the Central District of California.

Before: CHAMBERS, WRIGHT and TRASK, Circuit Judges. PER CURIAM:

The judgment of conviction is affirmed.

We cannot accept the contention that Seyed Sadrzadeh was entitled to start over again at the end of the government's case with a jury and not a judge when his wife Toni chose to plead guilty. Both had previously intelligently waived a jury. The trial court simply has to get on with its business and cannot give parties first a practice trial before the court and then summon a jury. *People v. Redwine,* 166 Cal. App. 2d 371, 333 P.2d 188, is distinguishable.

We can find nothing in *United States v. Van Leeuwen,* 397 U.S. 249, that aids Sadrzadeh. Where Customs is involved there must of necessity be more delay than in the ordinary transmission of the mails.

We find the proffer of a lie detector test was properly rejected.

Other points, we also find without merit.

APPENDIX "B."

Lie Detection.

174. *Detection of Deception: The Lie Detector.*[1]

The appliance now commonly in use is called a polygraph.[2] It is attached to the person of the man who is being questioned and makes a record, on a moving chart, of the questions and of the subject's changes in blood-pressure and rate of breathing as each question is asked. Some machines, in addition, measure pulse changes and changes in the resistance of the skin to a minute electrical current, due to sweat-gland activity. The interrogation will first allow time for allowing the subject to quiet down, and for recording his individual general level of bodily activity. Then key-questions relating to the crime or other happening (Did you rob the supermarket?) will be interspersed with neutral or irrelevant questions (How often have you smoked today?), so that the bodily reactions accompanying the two kinds of questions, and their answers, may be compared.

In most persons, as has always been popularly believed, lying and consciousness of guilt are accompa-

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[1]The most practical and complete treatment is Inbau, Lie Detection and Criminal Investigation (2d ed. 1948). A recent symposium, The Polygraphic Truth Test, with articles by Wicker, Cureton, and Trovillo, and comments thereon, appears in 22 Tenn.L.Rev. 711-774 (1953) and was issued by the Review as a separate pamphlet. It is an invaluable compendium of recent opinion and progress in the field. See also two lively and informative discussions: Smallwood, Lie-Detectors: Discussions and Proposals, 29 Corn. L.Q. 534 (1944), and Streeter and Belli, The Fourth Degree, 5 Vand. L.Rev. 549 (1952); 3 Wigmore, Evidence, § 999; Note, 23 A.L.R.2d 1306; Dec.Dig., Crim. Law, ⇦388, Evidence, ⇦150.

[2]For descriptions of the machine and its use, see Inbau op. cit. 5-17; Trovillo, op. cit., 22 Tenn.L.Rev. 748-757.

nied by emotion or excitement that expresses itself in bodily changes,—the blush, the gasp, the quickened heartbeat, the clenched hand, the sweaty palm, the dry mouth. The skilled cross-examiner may face the witness with his lies and involve him in a knot of new ones, so that these visible signs of lying become apparent to the jury. This is part of the demeanor of the witness that the jury is told they may observe and consider upon credibility.[3] The polygraph is able to record accurately some of these bodily changes alongside the very questions that produced them, and thus enables the skilled interpreter to make an analysis of truth or falsehood on a scientific basis, comparable to the doctor's diagnosis of health or disease.

True, the interpreter, like the diagnostician, must possess the "feel" or intuition, which comes from experience, in order to reach accurate results, but it seems that his technique had much to contribute to the difficult process of judicial fact-finding. It has been widely and successfully employed in criminal investigation and in business.[4] We cannot in our hearts be so confident

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[3]See, e. g., State v. McLaughlin, 126 Conn. 257, 10 A.2d 758, syl. 7 (1940); 3 Wigmore, Evidence, § 946, Dec.Dig., Witnesses ⇐315.

[4]"Some 200,000 persons in the United States have taken polygraph tests of deception in the last 20 years. Three hundred specialists have qualified, or are becoming qualified as experts in the giving and interpreting of polygraph tests. Literally the murders of thousands of men, women, and children whose violent and ignominious deaths remained mysterious, have been solved through the review by experts of polygraph charts.

"The state of Illinois has 45 such examiners; California 32; New York, 26; Indiana, 16; District of Columbia 14; Texas 13; Ohio 13; and Michigan, Georgia, and Tennessee, 8 each. In addition to approximately 100 police departments using the tests, there are 55 personal consultants who employ them in connection with investigative and personnel examinations." Trovillo, op. cit., 22 Tenn.L.Rev. 743. See also McEvoy, The Lie Detector Goes into Business, 38 Reader's Digest, no. 226, p. 69 (Feb. 1941).

of the reliability of the present system of resolving conflicts in testimony by impeachment, cross-examination and inferences from demeanor, that we can afford to reject scientific aid in the task.

No one could reasonably contend, at this stage of development, that the lie-detector test should be conducted in the court-room at the trial.[5] The conditions are too exciting, and the judge and jury are not competent to interpret the results. The issue is, shall the examiner who conducted the test be permitted to give his testimony presenting the chart and explaining his conclusion as to whether the subject believed he was telling the truth or was consciously lying in his answers to the crucial questions?

What is the attitude of the courts? The question arises in different ways. (1) When the state and the accused stipulate for the administering of the test, and for its admission in evidence, the trial judges have generally admitted the expert's evidence giving the results.[6]

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[5]In State v. Cole, 354 Mo. 181, 188 S.W.2d 43, syl. 12, 13 (1945) the accused requested the trial judge that a lie-detector might be used in examining the witnesses in court including the accused himself. In sustaining the denial of the request the court said, "Such dramatics before the jury would distract them and impede the trial."

[6]In Smallwood, op. cit., 29 Corn.L.Q. 540, n. 49, twelve cases in widely scattered trial courts are cited, Trovillo, op. cit., 22 Tenn.L.Rev. 33, reports that "55 experts have gone into court with their polygrams and testified as to the indications in the charts before judges and juries in municipal district and superior COURTS." But in the strange case of Le Fevre v. State, 242 Wis. 416, 8 N.W.2d 288, syl. 1 (1943), the judge, when the defendant offered the report and findings of the examiner, admitted the report but excluded the findings at the instance of the state. The district attorney testified that the test was made by an examiner chosen by the state under a stipulation that either the state or the defendant could introduce the finding, and that the result was actually favorable to the defendant. The upper

(2) When the results of a test, as above, taken under stipulation between the state and the accused, has been offered at the trial, and the judge's ruling thereon has been appealed, the appellate decisions are in conflict. One court approved the judge's ruling admitting the evidence.[7] Another sustained his ruling rejecting it.[8] The former result seems the just and expedient one.

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court approved the ruling, but reversed the conviction for insufficiency of the evidence. Perhaps the result can be sustained on the ground that from the district attorney's evidence that the tests were favorable to the accused he got all the benefit that he would have secured if the findings had been admitted. Three judges dissented. See Note; 1943 Wis.L.Rev. 430.

[7]People v. Houser, 85 Cal.App.2d 686, 193 P.2d 937, syl. 6, 7 (1948) (offered by state over objection of accused though he had stipulated that expert was qualified and that results should be admitted).

[8]Boeche v. State, 151 Neb. 368, 37 N.W.2d 593, syl. 3 (1949). In that case it was held that, where the defendant on trial for forgery offered in evidence the results of a test by a polygraph operator of the state crime laboratory with eight months' experience. Defendant had voluntarily submitted to the test, and claimed it supported his innocence. The judge on the state's objection rejected the evidence, and the majority held that this ruling was right as the test "has not yet received general scientific acceptance." The case is notable for the fact that three judges, in an able opinion written by Chappell, J., rejected this reasoning, and held that if an adequate showing of the qualification of the expert had been made, and if an adequate foundation of proof of the scientific soundness of the tests had been furnished, the evidence would have been admissible. This dissenting opinion may have broken ground for a new advance.

Compare also Peterson v. State, 157 Tex.Cr.R. 255, 247 S.W.2d 110, syl. 1, 2 (1952) where the accused, having voluntarily taken a test by an operator of the state, offered the operator to testify to the result, but this was excluded. The ruling was affirmed on the grounds (1) that the bill of exceptions failed to disclose what the excluded testimony would have shown, and (2) the results being inadmissible for the state are so also for the accused. Another case where an accused voluntarily submitted to a test by a state operative, but where his offer of the results was rejected at the trial and on appeal is Henderson v. State, 94 Okl.Cr. 45, 230 P.2d 495, 502, syl. 7, 8 (1951). The court

(This footnote is continued on next page)

(3) When the accused selects his own examiner and without any agreement with the state, submits to the test, and offers the result in evidence, the trial courts have usually excluded the evidence[9] and the upper courts have uniformly sustained them.[10]

(4) Occasionally, a reference to the taking of a lie-detector test, or the refusal to take such a test is sought to be introduced in the testimony. These cases are collected and described in the note.[11]

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in an extensive discussion contended that there was want of acceptance and of reliability. Its reasoning on the latter point is somewhat vitiated by a failure, in appraising the factor of error, to distinguish clearly between cases where the results are inconclusive and those where the conclusions are incorrect. See Wicker, op. cit., 22 Tenn.L.Rev. 719.

[9]In one notable case, however, the trial judge received such evidence, and his judgment overruling the state's objection is the only reported opinion upholding the admissibility of lie-detector tests. People v. Kenny, 167 Misc. 51, 3 N.Y.S.2d 348 (Co. Ct.1938). The opinion reflects a strong foundation laid by testimony vouching for the scientific basis and reliability of the test, given by Professor Summers of Fordham University.

[10]Frye v. United States, 293 Fed.1013 (Ct.App.D.C. 1923) (discussed above, § 170, n. 5; People v. Becker, 300 Mich. 562, 2 N.W.2d 503, syl. 4, 5, 139 A.L.R. 1171 (1942) ("There was no testimony offered which would indicate that there is at this time a general scientific recognition of the tests"); State v. Pusch, 77 N.D. 860, 46 N.W.2d 508, syl. 4 (1950); State v. Bohner, 210 Wis. 651, 246 N.W. 314, syl. 6 (1933).

[11]Testimony that an officer pointed out to the accused the parts of his test-chart where he was lying, doubtless offered on the theory that his failure to deny was an implied admission, was held inadmissible. Leeks v. State, 245 P.2d 764, syl. 15 (Okl. Cr. 1952). In People v. Wochnick, 96 Cal.App.2d 124, 219 P.2d 70, syl. 3 (1950), noted 35 Minn.L.Rev. 310, an officer testified that defendant had been told that he had been placed on the lie detector for a test and that there was a violent reaction when he was shown a certain exhibit; and that when he was asked for an explanation of such reaction he stated that he could not explain it. Though the judge instructed the jury not to consider this as evidence of the result of the test, the upper court held that the evidence was wrongly received. Similarly, it was held in State v. Kolander, 236 Minn. 209, 52 N.W.2d 458, syl. 7 (1952) that evidence introduced by the state that the ac-

The foregoing rulings embrace the greater number of the actual reported holdings. The courts have not been confronted with the situation which is a strategic one for the future of the technique. That is the case where the accused voluntarily but without any agreement as to the use of the results in evidence submits to the test and the expert's conclusions adverse to the accused are offered in evidence by the state. Though nearly all of the reported decisions deal with the third situation above, where the defendant whose interest is to select any expert or charlatan who will find in his favor offers his own ex parte test-results to prove his innocence, the opinions do not limit themselves to the particular situation presented, but declare the inadmissibility of lie-detector results generally.

One reason usually given for these general pronouncements is that the tests have not yet won sufficient scientific acceptance of their validity. Frequently the opinions seem to demand a universality of scientific approval, which as pointed out above,[12] has no basis in the standard applied to other kinds of expert testimony in scientific matters. If we thus deflate the requirement to the normal standard which simply demands that the theory or device be accepted by a substantial body of scientific opinion, there can be little

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cused, when requested to do so by the sheriff, declined to submit to a test, was erroneously received. Less strict than those holdings is Tyler v. United States, 193 F.2d 24 syl. 12 (Ct.App. D.C.1951, cert.den.). There the accused confessed after taking a polygraph test. An officer was allowed to testify that he stated to the defendant that the machine indicated that he was lying. The defendant claimed that his confession was involuntary, and the judge held that the officer's statement was receivable not to show the accused was lying, but as bearing on voluntariness as showing the circumstances leading to the confession. The upper court approved this ruling.

[12]See § 170.

doubt that the lie-detector technique meets this requirement. An inquiry made in 1952 among polygraph examiners and psychologists seems to substantiate the foregoing statement.[13]

Another reason, cognate with the foregoing, is that the tests have not been shown to possess that degree of reliability in actual practice to entitle them to consideration by judge and jury. Of course, no demand for infallibility in results could be supported, nor do our present methods of evaluating testimony have any very high degree of reliability. Obviously the lie-detector tests have substantial probative worth. The issue properly is, does their reliability-value outweigh the dangers of prejudicing or misleading the jury or of undue consumption of time? Studies which have been made of the reports of practicing examiners seem to indicate that "with highly trained and experienced examiners, we can expect correct judgments in about 80 per cent

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[13]Dr. Cureton summarizes the results of the survey as follows:

"(1) Of the 199 Examiners, 83 per cent believe the polygraph is highly valid for recording physiological reactions, 47 per cent recommend court testimony by competent examiners, and 83 per cent recommend periodic examination of certain personnel in business and industry.

"(2) Of the 230 psychologists who have conducted polygraphic tests of deception in experimental situations or observed or conducted such tests on criminal suspects, employed personnel, or applicants, 63 per cent consider the polygraph highly valid for recording physiological reactions, 51 per cent recommend court testimony, and 28 per cent recommend use in business and industry.

"(3) Of the small group of 35 psychologists who are also Examiners, 63 per cent think the polygraph is highly valid for recording physiological reactions, 60 per cent recommend court testimony, and 51 per cent recommend use in business and industry.

"(4) No appreciable proportion of any group considers the polygraph invalid and useless when in competent hands." A Consensus as to the Validity of Polygraph Procedures, 22 Tenn.L. Rev. 728, 740 (1953).

of the cases, inability of the examiner to make a confident judgment in about 17 per cent, and incorrect judgments in about three per cent."[14] Seemingly this degree of accuracy is sufficient to outweigh the dangers mentioned. The danger of prejudice or misleading is appreciable, but not overwhelming. It must be remembered that the jury would not witness the giving of the test but would hear only a description and interpretation of its results by the examiner. His interpretation may be tested on cross-examination and when debatable could be contested by the testimony of another expert. Such a contest, however, would rarely be profitable and consequently the consumption of time would seldom be extensive.

In the light of these findings, it is believed that the courts' wholesale exclusion of lie-detector test-results, for want of scientific acceptance and proved reliability, is not supported by the facts. Many courts can easily recede from this position, in a case where the foregoing facts as to acceptance and reliability are adequately proven by the expert himself as a foundation for his testimony giving the test-results.[15] In most of the cases where the results were held inadmissible no such foundation was laid,[16] and the decisions may be

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[14]Cureton, op.cit., 22 Tenn.L.Rev. 729. The quotation continues: "To attain this record the examiner, after training, requires *several years* of experience. Even trained examiners, with less experience, make incorrect judgments in at least 10 per cent of the cases, and report ambiguous records in more than 20 per cent." The statement is based on a report of Dr. Dael Wolfle on the lie detector for the armed services in 1941, when he was a member of the Emergency Committee in Psychology of the National Research Council.

[15]As in People v. Kenny, supra n. 9.

[16]As is pointed out in the opinions in People v. Becker, cited in note 10, supra, and in Boeche v. State (dissenting opinion), cited in n. 8, supra.

explained on that ground, since the scientific facts were not so indisputable and readily verifiable as to enable the court to take judicial notice of them.[17] The day for judicial notice will dawn after another decade of such explanations by expert witnesses.

The simple doctrine of wholesale exclusion seems, accordingly, an inadequate solution based upon estimates of acceptance and reliability which are no longer valid. When the courts turn from the answer "never" to the answer "yes, when expedient" the real difficulty becomes apparent. This is the difficulty of limiting admissibility to the only tests which are sufficiently reliable, namely, those administered and interpreted by "highly trained and experienced examiners."[18] So far, professional organizations of examiners[19] are in their infancy, and they have adopted no standards of training, but their officers can doubtless be called upon to furnish information as to qualified experts.

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[17]In People v. Forte, 279 N.Y. 204, 18 N.E.2d 31, 32, syl. 2, 3 (1938), the defendant at the end of his trial for first-degree murder, moved to reopen the case so that he could be given a lie-detector test. The motion was refused, and this was assigned as error after his conviction. The court of appeals affirmed and said: "We cannot take judcial notice that this instrument is or is not effective for the purpose of determining the truth. . . . Evidence relating to handwriting, finger printing and ballistics is recognized by experts as possessing such value that reasonable certainty can follow from tests. Until such a fact, if it be a fact, is demonstrated by qualified experts in respect to the 'lie detector,' we cannot hold as matter of law that error was committed in refusing to allow defendant to experiment with it."

[18]See note 14, supra.

[19]They are the International Society for the Detection of Deception, C. B. Hanscom, Secretary, School of Business, University of Minnesota, and the American Academy of Forensic Sciences, Prof. Ralph Turner, Secretary, School of Police Science and Administration, Michigan State College, East Lansing, Michigan. See Trovillo, op. cit., 22 Tenn.L.Rev. 764.

It is believed that the courts should meet the need for this new resource for fact-finding and minimize the dangers, by substituting for the rule of exclusion a standard of discretion, and by holding accordingly that the judge may in his discretion admit expert testimony giving the results of a test of an accused or other witness, offered by the state or the accused or by a civil party when the judge finds (a) that the expert is highly trained and experienced, and (b) that the probative value outweighs the danger of prejudice, confusion and waste of time.

In addition, by rule of court or by decisional recognition of powers traditional to the common-law judge,[20] it should be declared that on application of either party on notice a reasonable time before trial, or on the judge's own motion,[21] a test of a party or a witness may be provided for, with the results to be admissible in evidence if the expert can reach a conclusion satisfactory to himself as to truth or deception. If the person to be tested refuses to undergo the test, there is an end of the matter[22] except that if he is a party, his refusal may be proved against him.[23]

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[20]See §§ 8, 17.

[21]Trial judges, feeling the need of more light upon difficult problems of veracity, suggested lie-detector tests, and admitted the results of the tests, in State v. Lowry, 163 Kan. 622, 185 P.2d 147 (1947) and in Stone v. Earp, 331 Mich. 606, 50 N.W.2d 172 (1951). In each instance these hopeful expedients were discouraged by appellate holdings that it was error to admit the evidence.

[22]Apparently, in the present state of the art, it is impossible to make a reliable test upon a person who is unwilling but is physically compelled to submit. See Wicker, op. cit., 22 Tenn. L.Rev. 718, Trovillo, id. 744.

[23]In the case of an accused this would raise questions of self-incrimination, which are considered in §§ 80, 132, herein.

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-6

SEYED MOHAMMED SADRZADEH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 440 F. 2d 389.

JURISDICTION

The judgment of the court of appeals was entered on April 9, 1971. Mr. Justice Douglas extended the time for filing a petition for a writ of certiorari to June 8, 1971. The petition was not filed until July 1, 1971, and is out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court properly denied petitioner's motion to suppress evidence, seized pursuant to a warrant, on the ground that customs authorities had improperly delayed the delivery of a package through the mails on the ground that there was an insufficient showing of probable cause for issuance of the warrant.

2. Whether petitioner, having validly waived his right to trial by jury, was entitled to withdraw the waiver after the evidence in the case had been submitted.

3. Whether the trial court properly refused to admit into evidence, at petitioner's request, the results of a lie detector test.

4. Whether petitioner's motion for a mistrial was properly denied.

5. Whether hashish comes within the purview of 21 U.S.C. 176a.

STATEMENT

Petitioner and his wife were charged in a two-count indictment with the importation and concealment of hashish in violation of 21 U.S.C. 176(a). Both waived trial by jury and were tried before the United States District Court for the Central District of California (Crary, J.). After the evidence had been presented, petitioner's wife pleaded guilty to a superseding information charging the knowing and unlawful receipt of hashish without payment of the transfer tax imposed by 26 U.S.C. 4741(a), in violation of 26 U.S.C. 4744. The indictment against her was thereafter dis-

missed. Petitioner was convicted on both counts and sentenced to concurrent terms of five years' imprisonment. The court of appeals affirmed *per curiam* (Pet. App. A), 440 F. 2d 389.

On November 20, 1969, the United States Customs Service at the Airmail Facility of Los Angeles Airport received for processing a package from Afghanistan addressed to Toni Sadrzadeh, petitioner's wife (R. 20).[1] A Customs official opened the package since, at the time, the Customs Service inspected all packages received from the Far East (R. 29). The package consisted of a suitcase containing jackets and having a false bottom, which was apparent from its weight and size. Customs officials removed a portion of the false bottom and discovered a plastic bag containing what appeared to be marijuana or hashish (R. 25, 45). A sample was taken and forwarded for chemical analysis (R. 62, 73). On November 25, after learning that the substance was hashish, the officials had the false bottom of the suitcase repaired, arranged to have the package delivered, and sprayed the plastic bag and the interior of the false bottom with fluorescent powder (R. 63–66).

The parcel was delivered on the morning of November 29, 1969 (R. 67). Customs officials established a surveillance in front of petitioner's apartment and at 10:50 a.m. observed petitioner receive the package from the postal carrier (R. 67). A warrant to search petitioner's premises was then obtained (R. 130–134);

[1] We are lodging with the Clerk the record of proceedings below, including the motion to suppress and the trial transcript (R. —).

and the search commenced, shortly thereafter. During the course of the search, the agents located the suitcase. The false bottom had been removed and the suitcase no longer contained the hashish (R. 138). By use of an ultraviolet light, which revealed the presence of the fluorescent powder, the agents located the hashish behind a box found in the storage area of the apartment (R. 139). The hashish had been placed in six plastic bags, each containing about one pound (R. 139–140, 144–145). The ultraviolet light also disclosed the presence of fluorescent powder on petitioner's hands (R. 138). Other items seized during the course of the search included a tin containing marijuana, a can containing hashish, a scale and three pipes with a residue of hashish or marijuana, two musical instruments with the backs removed, and letters postmarked from Afghanistan addressed to petitioner's wife (R. 82–83, 139–144, 147, 176).

Petitioner's wife testified that both she and her husband used marijuana and hashish (R. 155, 164). She also stated that they had received hashish in packages from Afghanistan on two prior occasions (R. 163–165).[2] According to her testimony, neither she nor her husband was aware that the package in question contained hashish until, by virtue of the weight of the suitcase and the odor of hashish, they were alerted to the existence of a false bottom (R. 174). They then discovered the hashish and thereafter used the scales,

[2] Petitioner and his wife received numerous packages from Afghanistan. They operated an import shop and merchandise for their store was received in this manner (R. 156–158).

later seized during the search, to weigh the substance (R. 173).

ARGUMENT

1. Petitioner contends that the hashish contained in the suitcase should have been excluded from evidence because the authorities improperly delayed the normal progress of the package in the mails. In support of this contention, petitioner relies upon *United States* v. *Van Leeuwen*, 397 U.S. 249. But *Van Leeuwen* involved the detention of parcels deposited with the domestic mail service and sent first class. The parcels were not subject to discretionary inspection and were detained for the purpose of investigation. The sole question in that case related to the reasonablenesss of the twenty-nine hour delay between the initial detention of the packages and the securing of a search warrant as soon as the investigation revealed sufficient grounds to obtain one. The Court found the detention of the parcel reasonable.

Here, by contrast, the customs officials were authorized to open the package and inspect its contents when it first arrived. See, *e.g.*, *Catshausen* v. *Nazro*, 107 U.S. 215; *Lannon* v. *United States*, 381 F. 2d 858 (C.A. 9), certiorari denied, 389 U.S. 1041; *United States* v. *Beckley*, 335 F. 2d 86 (C.A. 6), certiorari denied *sub nom. Stone* v. *United States*, 380 U.S. 922; *United States* v. *Collins*, 349 F. 2d 863 (C.A. 2), certiorari denied, 383 U.S. 960; *United States* v. *Sohnen*, 298 F. Supp. 51 (E.D. N.Y.). The customs officials could have permanently seized the package once it was discovered to contain contraband. The question in this

case, therefore, is not whether the officials unreasonably delayed in obtaining a search warrant, but rather whether the customs authorities could properly allow the package to reenter the mails.

In this regard, petitioner argues that the evidence should have been excluded because the placing of the package back into the mails violated administrative regulations. Several cases have held that, even assuming postal or customs regulations were violated, exclusion of the evidence is not required since the regulations create no fundamental personal right in an addressee. *United States* v. *Beckley, supra; United States* v. *Davis,* 272 F. 2d 149 (C.A. 7); *United States* v. *Sohnen, supra.* But this question is not presented here. The regulations were not violated. The postal regulation cited by petitioner (39 C.F.R. 262.1(a)), calling for notice to an addressee and the obtaining of authority from him to inspect certain mail, refers only to sealed "letters" and is thus inapplicable. The customs regulation (19 C.F.R. 912(d)) which states that customs officers shall give notice to the addressee of the fact and reasons for the "seizure" of any article imported by mail, does not apply to cases such as this where articles are only temporarily detained. It follows that the court properly admitted the seized hashish into evidence.

Petitioner also contends (Pet. 41–43) that there was an insufficient showing of probable cause for issuance of the warrant with respect to paraphernalia related to the preparation and use of marijuana. This claim was not raised at the suppression hearing or at trial. In any event, petitioner does not contest the warrant

to the extent that it related to the mail parcel and its contents. The other items seized were either contraband or so closely related to the mail parcel and its contents that they were subject to seizure. *Louie* v. *United States*, 426 F. 2d 1398 (C.A. 9); *United States* v. *Berry*, 423 F. 2d 142 (C.A. 10); *United States* v. *Bridges*, 419 F. 2d 963 (C.A. 8); *United States* v. *One 1965 Buick*, 392 F. 2d 672 (C.A. 6). Even had their seizure been improper, their admission was harmless error.

2. Petitioner argues that he was denied his right to trial by jury because the court refused to permit withdrawal of his voluntary waiver of a jury trial after all the evidence had been presented. Withdrawal of an effective jury waiver is directed to the discretion of the trial court. *McCranie* v. *United States*, 333 F. 2d 307 (C.A. 5); *Riadon* v. *United States*, 274 F. 2d 304 (C.A. 6), certiorari denied, 364 U.S. 896. In this case, the trial court did not abuse its discretion. At the time petitioner requested permission to withdraw his waiver, all the evidence in the case had already been presented so that he was in effect seeking a new trial. As the court of appeals noted (Pet. App. A), "the trial court * * * cannot give parties first a practice trial before the court and then summon a jury."

Petitioner argues that the court's refusal to permit him to withdraw the waiver vitiated his defense strategy. Petitioner describes this strategy (Pet. 8) as absolute candor by him and his wife in order to establish their innocence. At the time his wife entered her plea of guilty, the evidence was in and this strategy